IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, JACKSONVILLE BRANCH, JACKSONVILLE BROTHERHOOD OF FIREFIGHTERS, A CHAPTER OF THE INTERNATIONAL ASSOCIATION OF AFRICAN-AMERICAN PROFESSIONAL FIRE FIGHTERS, ON BEHALF OF THEMSELVES AND THE CLASS THEY REPRESENT, Plaintiffs, v. CONSOLIDATED CITY OF JACKSONVILLE, Defendant.	CASE NO.: 3:13-cv-161-J-32MCR

PLAINTIFFS' AMENDED MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs the National Association for the Advancement of Colored People, Jacksonville Branch ("NAACP") and the Jacksonville Brotherhood of Firefighters, a Chapter of the International Association of African-American Professional Fire Fighters ("JBOF"), individually and on behalf of all others similarly situated, respectfully submit this amended motion for temporary restraining order, prohibiting the Jacksonville Fire and Rescue Department ("JFRD") from hiring new classes of firefighters after May 2013, unless and until such new classes reflect the percentage of Black representation in the City's population. This motion is made pursuant to Rule 65 of the Federal Rules of Civil Procedure and Local Rules 3.01, 4.05 and 4.06.

PRELIMINARY STATEMENT

This is an action against the Consolidated City of Jacksonville ("Defendant" or "the city") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* for the Defendant's unlawful racial discrimination in hiring and other practices in the JFRD.[1] The JFRD has been subject to a consent decree concerning its racially discriminatory hiring practices since 1971. In spite of the decree, Defendant has exhibited years of intransigence continuing to the present in failing to eliminate barriers to employment that have a disparate impact on Blacks interested in firefighting careers. On May 24, 2012, Defendant hired its first class of firefighters, since March 2010. Declaration of James Edwards ("Edwards Decl.") ¶ 16. This class of 24 firefighters includes only four Blacks (i.e., less than 17% of the class) and will worsen the racial makeup of JFRD's firefighter ranks. *See id.* In addition, Defendant plans on hiring August and November classes, each of approximately 24- 30 firefighters, again using the same hiring policies challenged in this lawsuit. Edwards Decl. ¶ 15. Plaintiffs therefore request a Temporary Restraining Order restraining Defendant from using its discriminatory policy to hire the August and November firefighter classes or any further classes of firefighters that do not reflect the 31% Black representation in the city's population. Additionally, Plaintiffs request that Defendant be required to increase Black representation in the next two hiring classes to reflect the shortfall of Blacks in the May 2013 hiring class.

This Court should grant Plaintiffs' motion because Plaintiffs are able to establish that they are likely to succeed on the merits of their claim, that they will be irreparably harmed if their motion is not granted, that the balance of hardships weighs in their favor, and that the

[1] Although Plaintiffs' Complaint alleges that Defendant's hiring, assignments, and hostile work environment violate Title VII, this motion only addresses Plaintiffs' hiring claims as Plaintiffs seek a TRO enjoining the further hiring of firefighters by Defendant under its discriminatory policy.

public interest favors a TRO. Plaintiffs are likely to succeed on the merits of their claim because Defendant's hiring process has a disproportionate impact on Black prospective firefighters. First, the process acts to screen out would-be Black firefighters before they can even apply for firefighter positions by requiring cost-prohibitive certifications without any guarantee of eventual hire. Once achieving certification, the hiring process includes other barriers with a discriminatory impact on Blacks, including the overuse of criminal background information beyond what is required by the State of Florida, the use of a Body Mass Inventory ("BMI") as part of the physical examination, significant subjectivity and discretion in determining which qualified applicants are placed in band one, and unlimited discretion by the JFRD Director in choosing qualified candidates for hire. *See* Edwards Decl. ¶¶ 5-9; Exhibits 1-2. This subjectivity allows bias to creep into the selection process. Finally, Plaintiffs are able to identify less discriminatory, viable alternatives. For instance, JFRD could institute a program that hires uncertified applicants to work as lesser paid firefighters while paying tuition for them to obtain the required certification, or JFRD could institute a scholarship program funding low income applicants to obtain certification. Once certified, JFRD could align its requirements under the criminal background screen to those required by Florida Statute, cease using the BMI as a disqualifying factor while instituting a physical fitness program, and provide safeguards for subjective decision-making.

Plaintiffs also can demonstrate that equity favors their motion. Plaintiffs will be immediately and irreparably harmed if this Court does not grant their motion because Defendant seeks to fill limited firefighter positions under its discriminatory policy. Even if a representative percentage of Black firefighters are eventually hired, they will have lesser seniority which will slow their eligibility for promotion and effect many aspects of decision-making as to

assignments, vacations, etc. This action deprives Plaintiffs of their federal civil rights as guaranteed by Title VII. This hardship outweighs any harm to the Defendant as Plaintiffs are only requesting that the status quo be maintained during the course of this litigation. The public interest also favors this Court granting Plaintiff's motion because the public has an interest in preventing racial discrimination. This interest is especially acute when it involves a public body, such as the JFRD, that should be held in high esteem. Thus, this Court should grant Plaintiff's motion for a TRO.

FACTUAL BACKGROUND

I. DEFENDANT'S HISTORY OF RACIAL DISCRIMINATION

The JFRD has a long history of racial discrimination and intransigence in combatting this discrimination. In 1971, the JFRD became subject to a consent decree pursuant to a class action law suit, *Coffey v. Brady*, 3:71-cv-44-J (M.D. Fla.), filed by private plaintiffs against the department. The class action focused on discrimination in hiring of entry level firefighters. As a result of the JFRD's violations of the consent decree through its failure to hire sufficient Black firefighters over the next 10 years, the decree was amended in 1982. The amended decree requires that the city adopt 1:1 hiring until the percentage of Black firefighters equals the percentage of Blacks in the local population, at that time 27%. The department adhered to the consent decree until 1992, when the City unilaterally abandoned the decree. The City never moved to be released from the decree nor did it provide notice to the parties or the judge that it was abandoning the decree. Attorneys representing the *Coffey* class filed a motion to show cause why the city should not be held in contempt for failing to adhere to the consent decree. Litigation concerning this motion is on-going. The bulk of the hiring of Black firefighters under this decree was from 1987-1992. In 1993, the percentage of Black firefighters was at its peak at 25.1%.

Since the City abandoned the decree in 1992, the percentage of Black firefighters has dropped significantly to approximately 21%, despite the fact that the City's Black population has increased to 31%. Edwards Decl. ¶ 12.

Additionally, many of the firefighters hired when the city was enforcing the consent decree are nearing retirement age. The fire department operates a Deferred Retirement Option Plan. Once a firefighter elects the plan s/he must retire within 5 years of adoption of the program. Between May 1, 2013 and December 31, 2013, 29 Black firefighters will be retiring. Edwards Decl. ¶ 14; Ex. 3 at 6.[2] Based on current hiring trends, the percentage of Black firefighters will continue to decline. Edwards Decl. ¶¶ 13-15.

Following the city's abandonment of the consent decree, racial discrimination in JFRD has continued unabated. On February 17, 2006, two African-American firefighters employed by the JFRD opened their lockers to find nooses hanging inside. This act of severe racial intimidation precipitated an investigation by the Jacksonville Human Rights Commission into the broad discriminatory practices and racially hostile work environment at the JFRD. The Commission issued a report in August 2006 finding a widespread pattern and practice of discrimination against Blacks in the JFRD. Following the issuance of the Human Rights Commission Report ("HRCR") and after two years without meaningful corrective action by the JFRD, the NAACP and JBOF filed charges with the EEOC on July 30, 2008, alleging discrimination in hiring, promotion, and terms and conditions of employment by the JFRD. On June 5, 2009, the EEOC issued a Letter of Determination finding that the JFRD engaged in the

[2] Exhibit 3 of Captain Edwards' Declaration contains excerpts from an analysis prepared in December 2010 by former JFRD Director Charles Moreland, concerning the impact on the demographics of the department under its present hiring trends. The entirety of that analysis was presented to the Court during the May 6-7, 2013 hearing in the *Coffey v. Brady*, 3:71-cv-44-J (M.D. Fla.) case and was introduced as Exhibit 58.

alleged discrimination and ordered the charge to the conciliation stage. On July 3, 2009, attorneys in the *Coffey* litigation filed an emergency motion against the City asking the Court to stay all hiring and promotion procedures within the JFRD. The Court denied the motion, but ordered the parties to enter into mediation before Senior United States District Judge Harvey E. Schlesinger. The NAACP, JBOF, and the EEOC agreed to stay the EEOC conciliation process in order to participate in the mediation. The Department of Justice, Civil Rights Division ("DOJ") also participated in the mediation sessions.

The mediation efforts continued for more than three years and the claims of discrimination were not resolved. As a result of the failure to reach agreement on the promotion claims, the DOJ filed suit against the City on April 23, 2012, alleging a pattern or practice of race discrimination in promotions in violation of Title VII of the Civil Rights Act of 1964. *U.S. v. Consolidated City of Jacksonville*, 3:12-cv-451 (M.D. Fla.). The NAACP and the JBOF filed a motion to intervene in that action, which was granted on March 30, 2013. Additionally, on March 30, 2013, a private lawsuit, *Smith et al. v. Consolidated City of Jacksonville*, 3:11-cv-345 (M.D. Fla.), also challenging the defendant's promotion practices, was partially consolidated with the DOJ lawsuit.

As a result of failure to reach agreement on the hiring claims that remained unresolved from the parties' mediation, the present action was instituted by Plaintiffs.

II. DEFENDANT'S DISCRIMINATORY HIRING PROCESS

A. Certification

In order to apply for a firefighter position, JFRD requires that all applicants must have completed courses necessary to obtain certification. Applicants must take and pass the State Firefighter Certification and the Florida EMT Basic certification. Edwards Decl. ¶ 5. The Florida

State College at Jacksonville ("FSCJ") which offers the required courses for certification and where the JFRD draws the majority of its applicants, is geographically removed from the historically Black communities of Jacksonville. Edwards Decl. ¶ 6. The certification process requires that an individual invest four to nine months, with a cost of $3,300 to $6,000, on the required courses. Edwards Decl. ¶ 6. Moreover, the structure of the required coursework is such that potential applicants are not eligible for federal student loans. Edwards Decl. ¶ 6. These requirements disproportionately screen out minority candidates because 31.1% of Blacks in Jacksonville live below the poverty line, compared to 18.3% of the general population of Jacksonville. U.S. Census Bureau, 2011 American Community Survey. Blacks are unwilling to expend the high costs for these courses only to apply for a job they believe they have little chance of receiving in light of JFRD's long history of racial discrimination.

The Defendant through the JFRD also requires qualified candidates to pass a battery of tests and screenings, including a driver's license screening, a criminal background check, a physical ability test, and a verbal interview. Edwards Decl. ¶¶ 5, 7. On information and belief, it is likely that the criminal background check, physical fitness test, and verbal interview all have a disparate impact on Black candidates. Candidates are evaluated on a point system where they are rated not eligible or 1 through 3 on each of the tests and screening devises. JFRD's Personnel Director uses a matrix to assign points. Based on these scores, qualified candidates are placed in either band one, band two, or are disqualified. An applicant must achieve 9 out of 12 possible points in order to be placed in Band One. Edwards Decl. ¶¶ 7, 8. Only those applicants placed in band one are hired although candidates in band two are also eligible for hire having passed all of the screening tests. Edwards Decl. ¶ 8. Finally, Defendant, through the JFRD, grants the JFRD Director unlimited discretion in the selection of qualified candidates from Band One. Anecdotal

evidence suggests that family and friends of mostly white incumbent and retired police officers or firefighters, especially those with ties to the Union, are given favorable consideration in the selection process.

B. Criminal Background Screening

The criminal background criteria used by JFRD have a disparate impact on Black applicants. Racial disproportionalities exist throughout the U.S. criminal justice process, from arrest to conviction and incarceration. For instance, in 2011, the FBI's Uniform Crime Reporting Program indicated that the black arrest rate for all crimes is 2.8 times higher than the white arrest rate.[3] The prosecution rate for felonies is 4 times higher than white prosecution rate for felonies and the felony conviction rate for Blacks is 3.4 times higher than the white felony conviction rate.[4] In 2009, the Black incarceration rate was 6 times higher than the white incarceration rate.[5]

Florida State law prohibits the hiring of persons convicted of misdemeanors for positions as firefighters **only if the misdemeanor is directly related to the position sought** and only for a period of 4 years after expiration of the sentence. Fla. Stat. §§ 633.34 and 112.011 (2)(b). The JFRD applies the misdemeanor prohibition to all misdemeanors, not just those directly related to the position sought. Edwards Decl. ¶ 7, 9. Similarly, JFRD does not limit its "look back" period to that of 2 years. Edwards Decl. ¶ 7; Ex. 2.

Additionally, under the criminal history matrix any applicant who has a misdemeanor or felony conviction of any kind can receive no more than 1 or 2 points from a possible three

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[3] FBI, Uniform Crime Reports, Crime in the U.S., 2011, Table 43. Available at http://www.fbi.gov/about-u.s./cjis/ucr/crime-in-the-u.s.-2011/persons-arrested/persons-arrested.

[4] BJS, Felony Defendants in Large Urban Counties, 2006, Appendices Tables 2 and 18, available at http://bjs.gov/index.cfm?ty=pbdetail&iid=2193; BJS, Felony Sentences in State Courts, 2006, Tables 1.1 and 3.2, available at http://bjs.gov/index.cfm?ty=pbdetail&iid+4559.

[5] BJS, Prison Inmates at Midyear 2009, Table 16. Available at ttp://bjs.gov/index.cfm?ty=pbdetail&iid=2200.

points. It is not clear whether an applicant can receive the maximum 3 points if he or she has a record of one or more arrests not leading to a conviction. Edwards Decl. ¶ 7, Ex. 2. Prior to 2010-2011 JFRD had a policy of not hiring any applicant with a criminal record, including an arrest that did not lead to conviction.

C. Physical Examination and Body Mass Index

Once an applicant is selected from Band One for hire, the applicant must submit to a physical exam that includes an analysis of the applicant's Body Mass Index ("BMI"). In approximately 2000, JFRD added a BMI index to its physical exam. Edwards Decl. ¶ 9. By information and belief, the BMI index was not initially used as a complete bar to hiring. At some point thereafter, JFRD began using the BMI index to disqualify some applicants from eligibility as firefighter applicants. *See id.* The present list of 109 Band One applicants contains three Black and one White applicant who failed the BMI and were deemed medically disqualified. Edwards Decl. ¶ 17, Ex. 4. Neither the State of Florida nor the National Fire Prevention Association Standards ("NFPA Standards") require the use of BMI levels as part of the physical agility test. *See* Fla. Stat. §§ 633.34 and 112.011 (2)(b).

D. JFRD Hiring Data

A summary of hiring data provided by the JFRD in 2007 shows that from July 2000 to July 2006, the JFRD hired 435 Caucasian applicants compared to only 64 Black applicants. Edwards Decl. ¶ 11. Only 15% of those hired by JFRD over the course of six years were Black. When these numbers are broken down by hiring class, the disparity is even more apparent: on April 24, 2006, only two members of a new class of 25 firefighters were Black; on May 2, 2005, only one member of a new class of 23 firefighters was Black; and on August 23, 2004, no

members of a new class of 20 firefighters were Black (or any other minority). Edwards Decl. ¶ 11.

From 2006 until 2011, JFRD has hired 247 firefighters. As of February 28, 2011, there were 1,207 service employees within the JFRD of whom 75% were Caucasian, 21% were Black, and 4% were classified as other minority. Edwards Decl. ¶ 12; Ex. 3.

Since 2010, JFRD has taken steps towards further reducing the number of Black applicants. For example, in the City's 2010-2011 budget, JFRD recommended that its Cadet Program be eliminated, thereby saving the City approximately $340,000. Edwards Decl. ¶ 20; Ex. 5. The Cadet Program was a program through which individuals were hired and worked for the JFRD while they attended courses at FSCJ to obtain the requisite certification. *Id.* Upon successful completion of the FSCJ program, those cadets were automatically hired as firefighters with JFRD. Approximately 70% of the cadets in the program were Black. The program was terminated in 2010. Edwards Decl. ¶ 20. The City also eliminated the Recruitment Officer position in its 2010-11 budget cuts. The primary purpose of the position was to recruit minorities. Since then, there has not been a recruitment officer dedicated to the hiring or retention of Black firefighters. Edwards Decl. ¶ 21.

The discriminatory hiring practices of Defendant Jacksonville, through the JFRD, have caused a significant decrease in the number of Black firefighters serving the City. Currently, only 21% of firefighters are Black, and given that a large number of Black firefighters hired under the consent decree are approaching retirement, the situation will become significantly worse in the next several years if the department's present practices are allowed to continue.

ARGUMENT

I. LEGAL STANDARD FOR TEMPORARY RESTRAINING ORDER

A temporary restraining order ("TRO") "serve[s] to maintain the status quo until a final decision on a matter can be reached." *U.S. v. DBB, Inc.*, 180 F.3d 1277 (11th Cir. 1999). A party seeking a TRO must establish: 1) a likelihood of success on the merits; 2) the TRO is necessary to prevent irreparable injury; 3) the potential injury outweighs the harm a TRO may cause the non-moving party; and 4) the TRO serves the public interest. *Ingram v. Ault*, 50 F.3d 898, 900 (11th Cir. 1995). Here, Plaintiffs are able to establish each factor such that this Court should grant a TRO barring Defendant from hiring firefighter classes after May 2013 that lack adequate Black representation.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM

Congress's objective in enacting Title VII of the Civil Rights Act was to "achieve equality of employment opportunities" by requiring "removal of artificial, arbitrary, and unnecessary barriers to employment" that "operate as 'built-in headwinds for minority groups.'" *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971); *Griffin v. Carlin*, 755 F.2d 1516, 1524 (11th Cir. 1985). Title VII prohibits employment discrimination based on race, color, sex, or national origin. 42 U.S.C. § 2000e (2010). Title VII expressly allows for a disparate impact model of discrimination, as first articulated by the Supreme Court in *Griggs v. Duke Power Co.* *See* 42 U.S.C. § 2000e-2(k). Under this analysis, discrimination occurs when an employer "uses a particular employment practice that causes a disparate impact on the basis of race . . . and fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity." *Id.* at §2000e-2(k)(1)(A)(I). If the employer is able to establish job relatedness and business necessity, then the plaintiff may still succeed in establishing a Title VII violation by demonstrating that less discriminatory alternatives were available to the employer. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

In the present case, Defendant adheres to a hiring policy that requires applicants to be certified before becoming eligible to apply for a firefighter position. Once certified, the department requires the passage of a battery of tests and screenings including a criminal background check, a Body Mass Index test, and an oral interview. These tests and screenings are scored and only those with high enough scores are placed in Band One. Only those persons in Band One are considered for hire even though persons in Band Two are also deemed eligible for hire. Lastly, the Director of JFRD has unlimited discretion in the final selection of qualified candidates. Defendant is unable to show that its discriminatory hiring policy is consistent with business necessity; even if it was able to make the requisite showing, less discriminatory alternatives exist. Accordingly, Plaintiffs are likely to succeed on the merits of their claim.

A. Defendant's Hiring Policy Disproportionately Screens out Black Prospective Firefighters.

In order to establish a *prima facie* case of disparate impact race discrimination under Title VII a plaintiff must identify a facially neutral employment practice that causes a discriminatory impact, as shown through statistical evidence, on the basis of race. *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1274-75 (11th Cir. 2000). Although the statistical analysis may focus on a comparison of the percentage of the protected group that applied versus the percentage of the group actually hired, such a standard is inappropriate when the challenged employment practice acts as a barrier to application in the first place. For instance, in *Griggs*, the Defendants required a high school diploma in order to be considered for any department except one. *Griggs*, 401 U.S. at 427. The Supreme Court, in determining that this employment practice created a disparate impact on African Americans considered the census data for the employer's state. *See id.* at 430 n.6.

Here, Defendant's hiring process has resulted in a disproportionately low number of Black firefighters as compared to the number of Blacks in Jacksonville, which was approximately 30.7% in 2010.[6] Further, if Defendant is allowed to continue hiring under its current policy, the rate of disproportionality will only worsen, thus necessitating the need for a TRO. *See* Edwards Decl. ¶ 14. Currently, Defendant employs approximately 1207 uniformed firefighters. As of February 2011, only 21% of these firefighters were Black. Considering that a large number of Black firefighters hired under the consent decree will be retiring soon, these numbers will significantly decline in the next several years. Defendant's history of discriminatory hiring after abandoning the consent decree and prior to Plaintiffs' EEOC charges illustrates the disproportionate effect of its hiring policy. In 2006, only two members of a new class of twenty-five firefighters were Black. In 2005, only one member of a new class of twenty-three firefighters was Black, and in 2004, no members of a class of twenty firefighters were Black. Cumulatively, from 2000 to 2006, Defendant hired 435 Caucasian applicants and only 64 Black applicants.

The reason for the disproportionality in Defendant's firefighter ranks can be traced to barriers created by its hiring policy. Because of the amount of subjectivity in Defendant's decision-making pertaining to hiring (as illustrated by the unlimited discretion given to the Director and his staff in the selection of qualified candidates), it is impossible to separate out each element that leads to disproportionality in Defendant's hiring. *See* 42 U.S.C. § 2000e-2(k)(B)(i). Yet, it is possible to point to some screening devices as contributing to the disproportionality. Jacksonville's own Human Rights Commission found in its 2006 Report to the Mayor that the requirement that applicants obtain certifications prior to application, and without any guarantee of eventual hire, created a significant barrier to Black applicants for a

[6] U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/12/1235000.html (last visited May 9, 2013).

number of reasons. First, the fire certification programs are structured in a way that prevents federal loans for students, which disproportionately screens out Black applicants because 31.1% of Blacks in Jacksonville live below the poverty line, compared to 18.3% of the general population. The courses cost $3,300 - $6,000 and take up to nine months to complete. Second, the Florida State College at Jacksonville ("FSCJ"), where the courses are offered, is the primary source of applicants to the JFRD. The FSJC's location is a deterrent since it is a significant distance from the historically African-American communities in Jacksonville.

As noted above, Defendant's hiring process also contains a significant degree of discretion and subjectivity, which is something the Eleventh Circuit and Supreme Court have been critical of in hiring decisions because of its potential for bias. *See Albemarle Paper Co.*, 422 U.S. at 433; *Griffin v. Carlin*, 755 F.2d 1516, 1523 (11th Cir. 1985). As the Eleventh Circuit has explained, even if it was not bound by former Fifth Circuit precedent that provided for "disparate impact challenges to the end result of multi-component selection procedures and to subjective selection procedures," it would still hold that "use of the disparate impact theory to challenge the end result of multi-component selection processes and to challenge subjective elements of those processes is appropriate." *Griffin*, 755 F.2d at 1523. Here, Plaintiffs are doing just that. As explained above, Plaintiffs have established that Defendant's hiring process, with its multiple screening devices and subjectivity, disproportionality impacts Black candidates for the firefighter position.

Additionally, Defendant's criminal background screening policies, which are much more restrictive than those required by Florida statute, have a disparate impact on Blacks. Courts have recognized that the use of overbroad criminal background screens have a disparate impact on

Blacks that may violate Title VII. *See El v. Southeastern Pa. Transp. Auth.*, 479 F.3d 232 (3d Cir. 2007); *Green v. Mo. Pacific R.R,* 523 F.2d 1290, 1293 (8th Cir. 1975).

B. Defendant is Unable to Demonstrate that its Hiring Process is Job-Related and Consistent with Business Necessity.

Once the plaintiff has presented a *prima facie* case that an employment practice has an adverse impact on a protected group, the burden of persuasion lies with the defendant to demonstrate that the policy is justified by business necessity. *Griggs*, 401 U.S. at 431. To prove that a selection device is job-related and consistent with business necessity, the Defendant must show that the selection device is valid. The Equal Employment Opportunity Commission's Uniform Guidelines on Employee Selection Procedures provide a framework for determining the proper use of selection procedures. 29 C.F.R. § 1607.1(B). *See Albemarle*, 422 U.S. at 431 (stating that EEOC guidelines are "entitled to great deference"). Under the Uniform Guidelines, employers may conduct validation studies to demonstrate that the selection device actually predicts successful job performance. In addition, the Eleventh Circuit has described the Defendant's burden as establishing that "there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business" and is "sufficiently compelling to override any racial impact." *Hamer v. Atlanta*, 72 F.2d 1521, 1533 (11th Cir. 1989) (*quoting Pettway v. American Cast Iron Pipe Company*, 494 F.2d 211, 245 (5th Cir. 1974)).

Here, there is little evidence that Defendant ever sought to have any aspect of its hiring policy validated. Further, Defendant's policy raises concerns as expressed by the Supreme Court and Eleventh Circuit with the difficulty in determining whether an employment practice is necessary when there is a significant amount of discretion and subjectivity inherent in the policy.

In *Albemarle*, the Supreme Court had to consider whether a vague and subjective employment practice was job related. 422 U.S. at 433. The Court held that the Defendant had not met its burden, stating, "[t]here is, in short, simply no way to determine whether the criteria actually considered were sufficiently related to the Company's legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact." *Id.* The same holds true for the present case. Defendant vests unlimited discretion in the Director and his staff for making the final determination of who is and is not qualified. Additionally, Defendant's overbroad criminal background screening is not sufficiently job-related or consistent with business necessity because the screening goes beyond what the State of Florida requires. Likewise, the use of the BMI to disqualify applicants cannot be justified because it is not required by state standards or NFPA Standards. Similarly, neither the Jacksonville Sheriff's Office nor the Jacksonville Corrections Officers use a BMI as selection criteria. Finally, in regards to Defendant's certification requirements, the existence of alternatives historically used by Defendant itself (i.e., the Cadet Program) and other fire departments raises serious questions about the necessity of requiring certification as a minimal requirement before even being able to apply to the JFRD.

C. Plaintiff is Able to Show the Availability of Less Discriminatory Alternatives Such as a Cadet or Scholarship Program.

If the defendant proves that the employment practice is valid, the burden shifts back to the plaintiff to show that the defendant could accomplish the same result using less discriminatory processes. *Albemarle, 422 U.S. at 432*; *Joe's Stone Crab*, 220 F.3d at 1275. Assuming *arguendo* that Defendant is able to establish a business necessity for its hiring policy, Plaintiffs will be able to establish that the Defendant has alternatives to the policy.

Concerning the certification requirement, one such alternative is to reinstitute the previously existing cadet program that allowed candidates to work while completing the

certification process at JFRD's expense. This program included a significant percentage of Blacks. Another possible alternative is to institute a scholarship program, that would provide a scholarship for eligible, low-income Jacksonville residents to attend the certification programs, as recommended by the 2006 Jacksonville Human Rights Commission's Report to the Mayor.

Concerning other parts of its hiring process, Defendant could adopt a criminal background screen consistent with Florida statute and eliminate the use of the BMI index as a disqualifier for employment.

Thus, because Plaintiffs are able to establish less discriminatory and viable alternatives, as well as a *prima facie* case of discrimination, this Court should find that Plaintiffs are likely to succeed on the merits of their claim.

III. ABSENT A TRO, PLAINTIFFS WILL BE IRREPARABLY HARMED BY DEFENDANTS' RACIALLY DISCRIMINATORY HIRING POLICY

A plaintiff seeking a TRO is required to demonstrate that irreparable injury is likely in the absence of a TRO. *Ingram*, 50 F.3d at 900. Plaintiffs are able to demonstrate a likelihood of harm that is immediate and non-speculative if this Court does not issue a TRO. This past month, the Defendant hired its first class of firefighters since March 2010. The class included 24 new firefighters, only four of whom are Black. Within the next four months, Defendants plan to hire two more firefighter classes under its discriminatory hiring policy. Under these hiring trends, these two additional classes will only perpetuate the disproportionate racial make-up of the JFRD and decrease the already limited positions for Black applicants who could be qualified for the positions but for the discriminatory hiring policy.

In a similar case that involved a Title VII disparate impact suit brought by a class of Black firefighters, plaintiffs moved for a temporary injunction prohibiting New York City's use of an alleged discriminatory selection practice. Prior to hearing on the plaintiff's motion, the

City of New York notified the District Court for the Eastern District of New York and plaintiffs that it planned to hire 300 new firefighters using the challenged selection practice. *U.S. v. New York*, 731 F. Supp. 2d 291, 296 (E.D.N.Y. 2010). The district court accelerated its hearing schedule and ultimately enjoined the defendants from any further hiring or continuing to use its discriminatory selection practice until it could determine a proper remedy. *Id.* at 315. This Court should similarly restrain Defendant from any further hiring under its discriminatory policy during the course of this litigation.

IV. THE BALANCE OF HARDSHIPS WEIGHS IN PLAINTIFFS' FAVOR

Plaintiffs' benefits from this Court issuing a TRO will outweigh any harm to the Defendant. First, Plaintiffs face substantial harm in the absence of a TRO. The disproportionate make-up of Defendant's firefighter ranks has a long history as evidenced by the ongoing litigation challenging its discriminatory hiring, promotion, disciplinary, and retaliatory actions. Yet, while this litigation is ongoing, Defendant seeks to perpetuate the disproportionate make-up of its ranks by hiring three classes of firefighters severely lacking in Black candidates and not representative of the Black population of this community. These actions deprive Plaintiffs of their rights under the Title VII to be afforded equal employment opportunities. Accordingly, the potential harm to Defendant is merely speculative, whereas the harm to Plaintiffs is immediate, irreparable, and in violation of Title VII. Enjoining Defendant's from hiring under its discriminatory policy will benefit the Plaintiffs far more than it will hurt the Defendant.

V. PUBLIC INTEREST FAVORS A TRO

Granting a TRO to Plaintiffs serves the public's interest in preventing employment discrimination. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 296 (2002). There is a strong public interest in preventing discrimination on the basis of race, an interest inherent in Title VII's

purpose of ensuring that unlawful employment practices do not occur. The Supreme Court has recognized that private civil rights suits can ensure broad compliance with the law. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968) (explaining, in the Title VII context, that when a plaintiff "obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority.") As the District Court for the Eastern District of New York explained, this public interest is especially strong when it involves the prominence of a fire department and the esteem in which it should be held. *U.S. v. New York*, 2010 WL 4137536, No. 07-cv-2067, *9 (E.D.N.Y. Oct. 19, 2010). Accordingly, the public interest favors granting a preliminary injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion for a temporary restraining order preventing Defendant from using its discriminatory policy to hire August and November 2013 firefighter classes, or any further classes of firefighters that do not reflect the 31% Black representation in the city's population. Additionally, Plaintiffs request that Defendant be required to increase Black representation in the next two hiring classes to reflect the shortfall of Blacks in the May hiring class.

Dated: June 4, 2013

Respectfully submitted,

The Law Office of Kirsten Doolittle, P.A.

s/Kirsten Doolittle_____

KIRSTEN DOOLITTLE
The Elks Building
207 North Laura Street, Suite 240
Jacksonville, FL 32202
Telephone: (904) 551-7775
Facsimile: (813) 274-6200

Email: kd@kdlawoffice.com

Lawyers' Committee for Civil
Rights Under Law

s/Jane Dolkart
JANE DOLKART
1401 New York Avenue, NW
Suite 400
Washington, D.C. 20005
Telephone: (202) 662-8391
Facsimile: (202) 783-0857
Email: jdolkart@lawyerscommittee.org
Admitted Pro Hac Vice

RAY MCCLAIN
1401 New York Avenue, NW
Suite 400
Washington, D.C. 20005
Telephone: (202) 662-8342
Facsimile: (202) 783-0857
Email: rmcclain@lawyerscommittee.org
Admitted Pro Hac Vice

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 4, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: Cindy A. Laquidara, General Counsel, Adina Teodorescu, and Carol Mirando, Office of General Counsel, 117 West Duval Street, Suite 480, Jacksonville, FL 32202.

s/Kirsten Doolittle
Kirsten Doolittle